A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees To Support Political Speech at Public Universities

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Classroom nudity[1] and hate speech regulations[2] are two much publicized free speech issues that have arisen recently at the University of California at Berkeley (hereinafter "U.C. Berkeley" or "University"). Both topics raise important questions about the limits of tolerance for free expression at a large public university, particularly one with a long tradition of free speech activities, yet both deal with expression which many believe has little civic value. Pleas to protect hate speech, for instance, often take the form of arguments that if we do not protect speech and expression absolutely, we risk jeopardizing speech on public policy, the speech which First Amendment theory values most.[3] Yet a greater threat to free speech on campus has gone largely unnoticed. In *Smith v. Regents of the University of California*,[4] the California Supreme Court ruled that the use of mandatory activity fees to fund political or ideological student groups at public universities violates the First

1. *See, e.g.*, T. Christian Miller, *'Naked Guy' Plans a Return to Class—in the Nude*, S.F. CHRON., Nov. 11, 1992, at A19. *But see* Peter Fimrite, *Naked Guy Arrested in Berkeley Under New Public Nudity Law*, S.F. CHRON., Aug. 28, 1993, at B4.

2. The University of California at Berkeley Code of Student Conduct, Nov. 11, 1992, Part I.B.16. For a discussion of the university tradition and hate speech codes, see Stephen C. Veltri, *Free Speech in Free Universities*, 19 OHIO N.U. L. REV. 783 (1993), which includes references to many of the dozens of articles and notes that have been written on this topic.

3. One prominent judicial and philosophical justification for protecting free speech is that free speech facilitates representative democracy. GERALD GUNTHER, CONSTITUTIONAL LAW 998 (12th ed. 1991). A leading proponent of this view is Alexander Meiklejohn. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). This view "tends to reserve the highest protection for political speech." GUNTHER, *supra*, at 1001. Meiklejohn argued that political speech should receive the highest level of First Amendment protection. MEIKLEJOHN, *supra*, at 24-25. For a criticism of Meiklejohn's position, see Zechariah Chafee, Jr., 62 HARV. L. REV. 891 (1949) (book review) (challenging Meiklejohn's argument that speech pertaining to self-government enjoys absolute protection under First Amendment). For a contemporary argument that speech on public issues is central to the First Amendment, *see* Cass R. Sunstein, *Half Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 33 (suggesting that principal current threat to freedom of expression is fact that our culture and economy produce very little speech on public issues).

4. 844 P.2d 500 (Cal.), *cert. denied*, 114 S. Ct. 181 (1993).

Amendment. This decision will in fact severely diminish student speech on issues of public concern at state universities.

University administrations typically have not considered the political content of a student organization's speech in determining whether or not to grant it funding.[5] Since the early 1970's, students have challenged activity fee systems that funnel general fees to groups that individual fee payers find offensive.[6] Prior to *Smith,* courts consistently upheld such systems, basing their decisions on factors such as university officials' discretion to determine which activities warrant subsidization, the importance in higher education of learning to tolerate speech and debate with one's opponents, and the idea that universities foster a "marketplace of ideas" by providing "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'"[7] Underpinning most of these decisions is a concept of the university campus as a public forum for its students.

This Note argues that in *Smith* the California Supreme Court broke with a tradition that permits universities to fund political student groups with mandatory fees, and that it did so because it failed to appreciate the relationship between the fee system and the creation of a public forum for students' speech. If the campus is viewed as a public forum, not only is the fee program which supports speech within the forum constitutional, but cutting off "political" student groups from such support is unconstitutional. These two propositions are intimately connected: The reason that the University does not violate the First Amendment when it compels students to support on-campus political speech is that the activity funding system, like campus grounds and facilities, is a public forum; because the activity funding system is a public forum, the University of California Regents (hereinafter "Regents") may not discriminate against political groups in subsidizing speech within that forum. If the Regents choose to subsidize speech within the public forum of the campus, they must do so according to content-neutral criteria. Reciprocally, by remaining neutral toward student speech within the forum, the University avoids endorsing any particular group's political and ideological opinions and thus avoids compelling speech in violation of the First Amendment.[8]

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5. A survey of 301 two-year and four-year private and public colleges, to which 217 institutions responded, indicated that 70.3% of colleges that collected a student activity fee did not consider whether student organizations were affiliated with political groups in determining whether they were eligible to receive funds. The remaining 29.7% prevented groups affiliated with political groups from receiving funds generated by mandatory activity fees. DAVID L. MEABON ET AL., STUDENT ACTIVITY FEES 20, 27, Table 8 (1979).

6. See *infra* Part II.B for a discussion of these cases.

7. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (citation omitted).

8. The argument advanced in this Note would not apply to private colleges and universities because the Fourteenth Amendment makes the First Amendment applicable only to government actions. The Civil Rights Cases, 109 U.S. 3, 17 (1883). Occasionally, courts have found that private parties have engaged in "state action" and thus are bound by the Fourteenth Amendment. *See, e.g.*, Lugar v. Edmonson Oil Co., 457 U.S. 922, 942 (1982). For a discussion of what factors courts consider in determining whether private university actions constitute "state action," see Mindy A. Kaiden, Note, Albert v. Carovano, *The Second*

Part I of this Note describes the *Smith* opinion, outlining the logic that led the court to order the Regents to identify student groups whose objectives are more political than educational and deny those groups access to funds generated by mandatory fees. Part II discusses the mandatory fee doctrine on which the court relied. It argues that the court should have asked whether or not funding a wide range of student speech, including political speech, was "germane" to the purpose of the activity fee program, rather than asking whether particular student groups were more "political" than "educational." In addition, Part II illustrates that in the past courts have found that support for controversial speech on public matters, as part of public university programs to support a campus forum in which a diversity of views are expressed, is germane to the university's educational mission. Part III argues that because the activity fee program's purpose was to support a public forum for students' speech, the University could not constitutionally discriminate against political and ideological speech in distributing funds for speech within that forum. Part IV explores the impact the *Smith* court's order will have on the activity group system and argues that discrimination against "political" and "ideological" student speech amounts to discrimination against student organizations based not only on the content but also on the viewpoint they express. Part V concludes that, as long as public universities utilize a distribution system which is itself content-neutral, they should be able to distribute funds generated from mandatory activity fees to political and ideological student groups that participate within the public forum of the campus.

I. THE *SMITH* DECISION

In *Smith*, the California Supreme Court ordered the Regents to restructure the student activity fee system that had been in place at U.C. Berkeley since 1955.[9] For nearly forty years before *Smith* was decided, every student at U.C. Berkeley had paid a mandatory activity fee to the Regents each semester. A portion of the funds generated by this fee were transferred from the University to the Associated Students of the University of California, Berkeley (hereinafter "A.S.U.C."), a student association which finances student government and student activity groups. Under the guidelines in place when the system was challenged, any four U.C. Berkeley students could create an activity group eligible for A.S.U.C. funding by registering with the University

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Circuit Redefines Under Color of State Law for Private Universities, 39 AM. U. L. REV. 239 (1989). Tests for whether a private party has engaged in "state action" and "acted under the color of state law" are usually identical. *Lugar*, 457 U.S. at 928-32. For a discussion of various theories that courts have employed in finding that action by a private university or college is "state action," see Richard Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J.L. & EDUC. 171 (1982).

9. *Smith*, 844 P.2d at 504.

and agreeing to comply with content-neutral regulations. Properly constituted student activity groups could use funds they received from the A.S.U.C. for defined activities.[10] The guidelines provided that the funds could be used for purposes related to the University or beneficial to the student body, and could not be used in connection with partisan political activities or ballot measures, except to fund nonpartisan educational fora on issues of interest.[11] In practice, this meant that groups receiving money were allowed to take ideological stands, but not to endorse political candidates or lobby for legislation.[12]

In 1979, the Pacific Legal Foundation filed a complaint in the California Superior Court on behalf of four U.C. Berkeley students challenging the Regents' power to collect mandatory fees and distribute them to student organizations dedicated to political or ideological causes.[13] The plaintiffs claimed that the University had violated both the California and U.S. Constitutions[14] by providing mandatory student contributions to the following groups: Amnesty International, Berkeley Students for Peace, Campus N.O.W. (National Organization for Women), Campus Abortion Rights Action League, East Bay Right to Life, Gay and Lesbian Union, Progressive Students Organization, Radical Education and Action Project, Sparticus Youth League, Students Against Intervention in El Salvador, Students for Economic Democracy, Iranian Student Association, U.C. Berkeley Feminist Alliance and Women Organized Against Sexual Harassment, U.C. Campus Sierra Club, Conservation and Natural Resources Study Student Organization, and Greenpeace Berkeley.[15]

The *Smith* court began its discussion by reviewing the Supreme Court's First Amendment mandatory fee doctrine. This doctrine generally prohibits the state from compelling an individual to fund political or ideological speech with which he or she disagrees. An exception to this prohibition arises when the

10. *Id.* To obtain funds, the groups submitted a budget to the A.S.U.C. Finance Committee for review, and the Finance Committee then forwarded the budget along with its recommendation to the A.S.U.C. Senate for approval. If a group's budget was approved, it could receive reimbursement from the A.S.U.C. for expenses incurred in running the organization. Expenses for which the student organization could receive reimbursement were "(1) personal services, (2) stationery and supplies, (3) telephone, (4) travel, (5) dues and subscriptions, (6) postage, (7) equipment rental, (8) advertising, (9) programs and printing, (10) facilities rental, and (11) other." *Id.*

11. Smith v. Regents of the Univ. of Cal., 248 Cal. Rptr. 263, 266 (Ct. App. 1988), *rev'd*, 844 P.2d 500 (Cal.), *cert. denied*, 114 S. Ct. 181 (1993).

12. Philip Hager, *Justices Halt Some Uses of Mandatory Student Fees*, L.A. TIMES, Feb. 4, 1993, at A3, A19.

13. In 1980, 32 additional students joined the plaintiffs. *Id.*

14. *Smith*, 844 P.2d at 505.

15. *Smith*, 248 Cal. Rptr. at 266 n.4. The suits were consolidated, and in 1982 the superior court held that U.C. Berkeley's fee system was constitutional. The California Court of Appeals affirmed. *Id.* at 275. The California Supreme Court accepted the case for review, but deferred briefing pending release of the U.S. Supreme Court's decision in Keller v. State Bar, 496 U.S. 1 (1990), a case challenging the California State Bar's practice of using mandatory fees to support political and ideological activities. The California Supreme Court then remanded the case for reconsideration in light of *Keller*, and the Court of Appeals once again affirmed the superior court's judgment. *Smith*, 3 Cal. Rptr. 2d 384 (Ct. App. 1992). The California Supreme Court then granted review of the decision. *Smith*, 844 P.2d at 505.

state can compel an individual to support an organization because the organization serves a public function, and speech by the organization which the individual incidentally supports is "germane" to that function.[16] The question before the *Smith* court was whether speech by political and ideological student groups was sufficiently "germane" to the function served by the University to fit within the exception.

The court rejected the University's argument that funding political student groups is germane to the University's purpose because it educates students by allowing them to express their views, participate in campus administration, learn about governmental processes, develop social skills, inform the student body about various issues, and ensure freedom of expression and association.[17] The court dismissed the possibility that public forum doctrine applied to the case, relegating that issue to a footnote.[18] Rather than analyzing the entire mandatory fee system as a means of promoting a forum for a wide range of student speech, the court attacked the educational value of particular groups that received funding. The court asserted that it is "obviously true . . . that a group's dedication to achieving its political or ideological goals, at some point, begins to outweigh any legitimate claim it may have to be educating students on the University's behalf."[19] Thus, the court reasoned, the mandatory fees were being spent for political speech which, by definition, was not germane to the public function served by the University. The court's solution to what it perceived as a violation of the freedom not to fund speech was to require the Regents to determine which student groups are more ideological or political than educational, and to offer students the option of deducting an amount corresponding to the percentage of the A.S.U.C. budget that any of those groups would receive from the students' activity fees.[20]

Under the *Smith* regime, groups branded "political" or "ideological" will suffer. While the amounts of money at stake are not huge, student groups rely on the money to carry out such projects as bringing speakers to campus, renting meeting facilities, showing films, and printing literature for distribution

16. See discussion *infra* Part II.A for a description of this doctrine and the *Smith* court's treatment of it.

17. *Smith*, 844 P.2d at 508.

18. *Id.* at 509 n.8.

19. *Id.* at 508.

20. *Id.* at 513. The court called for use of a procedure similar to those used by labor unions and bar associations. *Id.* The University and A.S.U.C. sought review of the decision, but in October 1993, the Supreme Court denied a petition for certiorari. Regents of Univ. of Cal. v. Smith, 114 S. Ct. 181 (1993). Thus, the Regents must abide by the California Supreme Court order that they determine which groups are more political or ideological than educational and offer students an opportunity to withhold funds from those groups. The University of California President has issued Interim Guidelines to assist University of California campuses in complying with *Smith*. The Guidelines would make groups that are "principally dedicated to effecting political or ideological purposes, as distinguished from educational purposes such as promoting discussion or debate from different perspectives," ineligible for funds generated by mandatory activity fees. Interim Guidelines for Implementing the Requirements of *Smith v. Regents*, Part I (Nov. 4, 1993).

to the student body. "Political" and "ideological" expressive activities will decrease if student-run organizations must rely on voluntary donations from fellow students for financial support of these activities. The decision flies in the face of the campus' function as a forum for students and ignores "[t]he principle underlying the expenditure of student body organization funds collected through mandatory fees[—]that such expenditures shall be made in programs that reflect the broadest variety of student interests and that are open to all students who wish to participate."[21] If the University were permitted to distribute the money to student groups on a content-neutral basis, on the other hand, it could properly assert that the mandatory fees were used to create a public forum for diverse student speech. As will be argued, when a public university funds political speech as part of a program in which funds for speech are granted on a content-neutral basis to support a campus forum, the university avoids the First Amendment evil of forced speech.[22]

II. MANDATORY FEE DOCTRINE

Contrary to the *Smith* court's averments, its decision did not proceed logically from the Supreme Court's doctrine regarding the use of mandatory fees to support political and ideological speech. This doctrine requires an inquiry into the relationship between the funded speech and the recipient organization's larger purpose. If the funded speech is germane to the function served by the organization—that is, the function which justifies the government compelling individuals to fund the organization in the first place—then the organization may use compelled dues to fund the speech. Thus, in *Smith*, the court should have asked whether the funding scheme as a whole was germane to the government's neutral goal of creating a forum for student speech, not whether individual student groups were primarily political. By narrowly focusing on the political nature of the funded speech, the *Smith* court failed to see the connection between the speech and the University's educational purpose.

A. *The "Germaneness" Test*

In describing the mandatory fee doctrine, the *Smith* court discussed *Abood v. Detroit Board of Education*[23] and *Keller v. State Bar*[24] at some length. Like the student plaintiffs in *Smith*, dues-payers in *Keller* and *Abood* objected to having the fees they were compelled to pay used to support speech with which they disagreed. In *Abood*, a case in which non-union employees challenged a

21. Cal. Code Regs. tit. 5, § 42659 (1993).
22. *See infra* Part II.B.
23. 431 U.S. 209 (1977).
24. 496 U.S. 1 (1990).

labor union's use of their mandatory union fees to fund political speech, the Court recognized that a union's activities as an exclusive bargaining agent are, to a certain extent, inherently ideological.[25] For example, in negotiating health benefits, a union cannot help but take a position as to how to treat abortion.[26] Far from being unconstitutional forced speech, "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."[27] On the other hand, union contributions to political candidates or to fund political speech were held to be similar to compelled affirmations of belief in certain political opinions, an infringement on First Amendment rights.[28] The First Amendment thus prohibits unions "from requiring any of the appellants to contribute to the support of an ideological cause he may oppose"[29] if it is unrelated to the union's purpose for existing, that is, collective bargaining.[30] In *Keller*, the Court applied the same principles to a challenge to a state bar's use of mandatory dues for political speech and held that the functions for which mandatory fees could be used were limited to those "in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession,"[31] rather than taking positions on political issues.

Thus, using mandatory fees to fund political speech or activities is not per se unconstitutional. Organizations can fund political or ideological speech with the mandatory fees of dissenters as long as it is *germane* to the purpose that justifies the compelled association.[32] In cases involving labor unions courts have recognized a range of activities, including political activity, as germane to collective bargaining. Non-union employees can "be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract . . . but also the expenses of activities or undertakings . . . reasonably employed to implement or effectuate the duties

25. *Abood*, 431 U.S. at 222. The union's collective bargaining agreement included an "agency-shop" clause requiring every employee who was not a member of the union to pay a union service charge equal to the regular dues required of union members. *Id.* at 212.

26. *Id.* at 26.

27. *Id.*

28. *Id.* at 234-36. The principle that the First Amendment includes a right against compelled speech has been affirmed many times by the Court. *See, e.g.*, West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (state may not compel students to salute flag).

29. *Abood*, 431 U.S. at 235.

30. *Id.* at 235-36.

31. Keller v. State Bar, 496 U.S. 1, 15-16 (1990).

32. In his concurrence to *Abood*, Powell emphasizes that speech must be *both* political or ideological *and* not germane to the organization's purpose to be forbidden by mandatory fee doctrine: "In order to vindicate his First Amendment rights in a union shop, the individual employee apparently must . . . initiate a proceeding to determine what part of the union's budget has been allocated to activities that are both 'ideological' *and* 'unrelated to collective bargaining.'" *Abood*, 431 U.S. at 254-55 (emphasis added).

of the union as exclusive representative of the employees in the bargaining unit."[33]

Unions have been allowed to use mandatory fees for lobbying activities when "pertinent to the duties of the union as a bargaining representative."[34] For example, in *Robinson v. New Jersey*, the Third Circuit held that a union could lobby state legislators in regard to state regulation of such matters as pensions, overtime, subcontracting, and health plans with nonmembers' funds.[35] As long as the lobbying is germane to the purpose which justified the compelled association, it "has no different constitutional implication from any other form of union activity that may be financed with representation fees."[36] Thus, non-union employees can be forced to subsidize it.

Far from being a litmus test for whether an activity is political or nonideological, "germaneness" looks at the connection between the funded activity and the organization's purpose. Thus, the *Smith* court should not have ordered the Regents to cut off funding eligibility for all political groups before carefully considering whether political speech was germane to the purpose of the student activity program. As will be argued, distribution of funds to student organizations which spoke on political and ideological issues was not only "germane" but essential to the purpose that justified the mandatory dues: creating a public forum for student speech.

B. *Mandatory Funding of Political Student Speech Is Germane to the Creation of a Forum for Student Speech*

While ostensibly using a "germaneness" test to decide whether the University could use mandatory funds to support political student speech,[37] the *Smith* court failed to recognize that "germaneness" and purpose are intricately connected. If the student activity group program serves a purpose which is appropriate for the University to pursue, and funding political student groups is germane to the purpose of the program, then use of the mandatory activity fees to fund speech by political student organizations is constitutional.

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33. Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 448 (1984). In *Ellis*, employees objected to an agency-shop fee they were required to pay under the Railway Labor Act, 45 U.S.C. § 152, Eleventh (1988). The Court was willing to recognize that activities other than formal bargaining, for instance attending national union conventions, union social activities, and publishing portions of a union magazine that did not discuss political issues, were all sufficiently related to collective bargaining to justify compelled support. *Id.* at 448-51.

34. Robinson v. New Jersey, 741 F.2d 598, 609 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

35. *Id.*

36. *Id.*

37. The *Smith* court did acknowledge that "the state may compel a person to support an organization if there is a sufficiently compelling reason to do so, and that the organization's use of mandatory contributions must be germane to the purposes that justified the requirement of support." *Smith*, 844 P.2d at 508.

When deciding the constitutionality of student activity programs resembling the one at U.C. Berkeley, other courts have recognized that the purpose of mandatory student fees is to create a public forum for student speech. These programs serve an educational purpose appropriate for an institution of higher education. As one court stated, "[t]he fact that certain ideas are controversial and wholly disagreed with does not automatically make them non-educational."[38] While exposure to only a single point of view might indoctrinate rather than educate, exposure to debate between opposing viewpoints is educational and does not imply that a particular point of view is correct.

Not only have programs to support diverse student speech been regarded as educational, but if fees are distributed to student groups on a content-neutral basis, then the programs have been deemed to serve the neutral purpose of supporting a forum, not the purpose of espousing any particular group's viewpoint. It is the lack of content-based standards that enables the system to support a legitimate campus forum, and this in turn creates a distance between those who fund the forum and any particular view expressed within it, thus avoiding unconstitutional forced speech. The idea that support for a particular group's speech as an incident to support for a campus forum does not imply endorsement of that group's message was most clearly established in *Widmar v. Vincent*.[39] In *Widmar*, the Court rejected the university's argument that if it were to allow religious groups to use its buildings, it would give the impression that it was endorsing religion in violation of the Establishment Clause: "[B]y creating a forum the University does not thereby endorse or promote any of the particular ideas aired there."[40]

In deciding cases challenging public universities' use of mandatory fees to support fora for student expression, several courts have held that the systems were constitutional because they did not involve endorsement of any particular group's speech.[41] In rejecting a student's constitutional challenge to use of mandatory fees to support a student newspaper, student association, and campus speaker program, one court drew a distinction between forcing students to adopt political opinions and imposing a tax with which to finance "programs which provide a forum for expression of opinion."[42] The university funding of programs that expressed "widely divergent opinions on a number of

38. Lace v. University of Vt., 303 A.2d 475, 480 (Vt. 1973).

39. 454 U.S. 263 (1981).

40. *Id.* at 272 n.10. In *Widmar*, mandatory student fees were used to defray the cost of facility use by student groups such as the plaintiffs', so the issue of mandatory student fees being used to compel support of speech was incorporated into the question of whether the university was endorsing speech by allowing an organization to use its facilities. *Id.* at 265.

41. Arrington v. Taylor, 380 F. Supp. 1348 (M.D.N.C. 1974); Veed v. Schwartzkopf, 353 F. Supp. 149 (D. Neb.), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert denied*, 414 U.S. 1135 (1974); Good v. Associated Students, 542 P.2d 762 (Wash. 1975) (en banc); *Lace*, 303 A.2d at 475.

42. *Veed*, 353 F. Supp. at 152-53.

topics,"[43] did not show in itself that the university advocated a particular philosophy or viewpoint.[44] Courts have also distinguished between forced subsidization of particular causes and the forced subsidization of a "speakers corner," such as that in Hyde Park, which "provides a platform for the espousing of social, religious and political ideas by various and divergent individuals . . . to inject a spectrum of ideas into the campus community."[45] In *Good v. Associated Students*,[46] a Washington state case in which the court upheld a student activity program similar to that at U.C. Berkeley, the court held that students could be compelled to pay an activity fee to support programs which foster "an atmosphere of learning, debate, dissent and controversy."[47] Although students may not agree with all the speech which receives funding, "[i]f such views are expressed only as a part of the exchange of ideas and there is no limitation or control imposed so that only one point of view is expressed through the program, there is no violation of the constitutional rights of the plaintiffs."[48] The court reasoned that because the university was funding a public forum, students were not forced to support speech with which they disagreed.[49]

The distinction between forced support of a public forum and forced support of a particular speaker has also been used in upholding the constitutionality of forced support of campus newspapers.[50] Students may be required to support a campus newspaper because it serves the permissible government purpose of "complement[ing] classroom education by exposing the student body to various points of view on significant issues, and [allowing] students to express themselves on those issues."[51] Because particular editorial positions do not claim to express the opinion of the entire student body, courts have held that support for the newspaper does not imply that one agrees with views expressed within the forum by particular speakers.[52] As one court stated,

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43. *Id.* at 152.

44. *Id.*

45. *Lace*, 303 A.2d at 479.

46. 542 P.2d 762 (Wash. 1975) (en banc).

47. *Id.* at 768.

48. *Id.* at 769.

49. While funding student organizations with diverse viewpoints was constitutional, the court held that the university "may not compel membership in an association . . . which purports to represent *all* the students at the university" when it makes political and ideological statements, *id.* at 768, for "[t]here is no room in the First Amendment for such absolute compulsory support, advocation and representation." *Id.* This supports the thesis that what makes mandatory activity fee systems such as those at issue in *Smith* and *Good* constitutional is the fact that they involve support for a public forum, or student organizations in their totality, *as opposed to* support for any particular organization which espouses a particular point of view.

50. Arrington v. Taylor, 380 F. Supp. 1348 (M.D.N.C. 1974).

51. *Id.* at 1362.

52. The newspaper "speaks only for those which control its content at any given time. It does not speak on behalf of a group with which the plaintiffs are identified, i.e., the student body." *Id.*

> the University's imposition of student fees is not designed to further the University's ideological biases, but instead to support an independent student newspaper. The University's academic judgment is that the paper is a vital part of the University's educational mission, and that financing it is germane to the University's duties as an educational institution.[53]

When a general fund is made available so that students of differing viewpoints can express themselves to their fellow students, fee-paying students are not being compelled to fund the dissemination of one viewpoint with which they disagree.[54]

These cases indicate both (1) that activity group programs that support student organizations holding a diversity of views, including political views, can be considered educational and thus appropriate for universities to administer, and (2) that in order to ensure that students are not forced to endorse particular views when they pay their activity fees, funds cannot be distributed within such programs in ways that favor some viewpoints over others. Courts have been concerned with the possibility that the mandatory student activity fee system could be used to distort public debate if funds are given to student groups on the basis of their point of view.[55] In addition, if funds were given out in a content-biased way, the university would appear to endorse the viewpoints of groups that had succeeded in their application for funds. To avoid this possibility, students who wish to express their opposition to positions taken by funded student groups must also have access to funds for this purpose. Unless universities are forbidden from discriminating on the basis of content in distributing funds, students who pay mandatory fees will in fact be forced to subsidize a particular set of views rather than a public forum. Thus, under the rationale which makes use of mandatory fees to support political student speech constitutional—that the funds are used to support a

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53. Kania v. Fordham, 702 F.2d 475, 480 (4th Cir. 1983). In *Kania*, a student at the University of North Carolina at Chapel Hill argued that *Abood* forbade the university from compelling the student to pay the portion of his mandatory fees that funded a student newspaper, *The Daily Tar Heel*, with which he disagreed.

54. In Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993), students also alleged that university funding of a student newspaper with mandatory fees violates *Abood*. The court noted that the student-run newspaper increased debate on campus and that the university had not attempted to "control the viewpoints expressed by the newspaper and that there were no ideological prerequisites for joining the paper's staff. The University provided the students with the funds needed for the students themselves to engage in debate and did not force ideological conformity." *Id.* at 123. Again, the fact that funds were not used to support one particular political or ideological position but to create a forum for debate among political positions was viewed as an important distinction between the mandatory activity fee system and the agency-shop system.

55. In *Good*, the court stated that a university may not give out funds to student groups in a manner that promotes "one particular viewpoint, political, social, economic or religious." Good v. Associated Students, 542 P.2d 762, 769 (Wash. 1975) (en banc). In *Arrington*, the court noted that while the school newspaper's editorials may be subsidized, "plaintiffs have available an additional forum to express themselves in opposition to views set forth therein." 380 F. Supp. at 1362.

public forum for student speech—it is critical that the university distribute funds to student groups on a content-neutral basis.

The fact that it is the concept of funding a public forum which made these programs constitutional is highlighted by the only two cases in which courts have found that *Abood* forbids compelled funding of political organizations. Both of these cases involved groups seeking money for off-campus speech. In both cases, the courts held that *Abood* prohibited universities from requiring students to support off-campus activities by Public Interest Research Groups (PIRG's).[56] In *Galda v. Rutgers*,[57] the court explained that a distinction could be drawn between a PIRG and student organizations funded through student activity fees. "[T]he student activity fee is used to subsidize a variety of student groups, and therefore that assessment can be 'perceived broadly as providing a 'forum' for a diverse range of opinion,'"[58] and "exposing the university community to a diversity of responsible opinion."[59] The PIRG, by contrast, is a separate entity which takes single, consolidated political positions and conducts much of its speech outside the campus forum. In *Carroll v. Blinken*,[60] the court held that a PIRG served university-related functions sufficient to justify its compelled funding for its speech *on campus*.[61] Indeed, the court noted that a scheme in which funding was optional would impair the group's ability to enrich campus life, and "funding would be balkanized and students would cease to be linked by a common bond to the tolerant support of all points of view."[62] As to off-campus activities, however, the court found that the educational value of activities did not justify compelled student support. Both *Galda* and *Carroll* suggest that until *Smith*, courts allowed universities to charge mandatory fees to support political speech within the campus forum, as long as the system created a true public forum in which the

56. In Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986), the court held that a state university could not compel students to pay a fee "to an independent outside organization that espouses and actively promotes a political and ideological philosophy which they oppose and do not wish to support." *Id.* at 1064. The court went to great lengths to make clear that it did not decide whether a student-run organization that used funds for expressive activity *on campus* could receive funds from a mandatory activity fee.

57. *Id.*

58. *Id.*

59. *Id.* at 1067.

60. 957 F.2d 991 (2d Cir. 1992).

61. *Id.* at 1000-01.

62. *Id.* at 1002.

government did not discriminate against speakers on the basis of the content of their speech.[63]

III. PUBLIC FORUM DOCTRINE

It is well established that when a public university opens campus spaces for expression by student groups, it creates a public forum.[64] A public university cannot prevent groups from using public facilities that constitute a public forum on the basis of the content of the groups' speech,[65] nor can it prevent the campus from becoming a public forum for students simply by imposing rules that partially limit speech on campus grounds.[66] Relying on the conventional conception of "public fora" as spatial property, one might argue that while public university campus grounds and facilities are a public forum for students, access to funds used to amplify one's speech within the

63. This analysis is also consistent with Student Gov't Ass'n v. Board of Trustees, 868 F.2d 473, 476 (1st Cir. 1989), in which the court refused to engage in a public forum analysis of the University of Massachusetts' decision to abolish its Legal Services Office, because the office was not a public forum. Rather, the court held, the office existed to help students participate in the public forum of the court system. This distinction, between a group which speaks within the campus forum and a group which helps students speak within an outside forum, is similar to the *Galda* and *Carroll* distinction between PIRG groups organized for on-campus speech and those which lobby in another public forum, the state legislature. Only if speech is directed to the on-campus forum is public forum doctrine controlling.

64. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (public university campus is a "designated" public forum); Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) ("[T]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum."); Hays County Guardian v. Supple, 969 F.2d 111, 116 (5th Cir. 1992), *cert denied*, 113 S. Ct. 1067 (1993) ("[T]he outdoor grounds of the campus such as the sidewalks and plazas are designated public fora for the speech of university students."). Because public university campuses are sometimes described as "designated" public fora and sometimes simply as public fora, and because the same standards govern designated public fora and public fora, *see infra* note 65, this Note refers to them simply as "public fora."

65. The type of speech restrictions the government is permitted to make depends on the character of the public property on which the speech takes place. In *Perry*, the Court recognized three categories of public property for the purposes of public forum analysis: the traditional public forum, the limited or designated public forum, and the nonpublic forum. *Perry*, 460 U.S. at 45-46. Quintessential traditional public fora are public streets and parks, which for "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 496, 515 (1939). In traditional public fora the government may not discriminate among speakers on the basis of the content of their speech without narrowly drawn restrictions that serve a compelling state interest. *Perry*, 460 U.S. at 45. In limited or designated public fora, property not traditionally open for free speech but which the government has "expressly dedicated to speech activity," United States v. Kokinda, 497 U.S. 720, 726 (1990), the state "is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry*, 460 U.S. at 46. Examples of limited or designated public fora include university meeting facilities, school board meetings, and municipal theater. *Id.* at 45-46. Thus, in *Widmar*, the Court held that a public university may not prevent religious groups from using campus facilities on the basis of the content of the group's speech. *Widmar*, 454 U.S. at 267-77. Finally, in nonpublic fora, "[p]ublic property which is not by tradition or designation a forum for public communication," such as the school mail facilities at issue in *Perry*, the government may restrict speech according to content to reserve the forum for its intended purposes. *Perry*, 460 U.S. at 46. Regulations of speech in nonpublic fora need only be reasonable and viewpoint neutral. *Id.*

66. *Hays*, 969 F.2d at 117. To determine whether the campus serves as a public forum for students, the court must look to whether the university has a general policy and practice of allowing student speech on campus.

forum need not be analyzed in terms of public forum doctrine. Presumably the California Supreme Court did just that, thereby removing the mandatory funding system from public forum analysis. This Part argues that a stark distinction between granting access to public fora as space and granting money for the speech within that space is superficial. For the forum to be meaningfully available to speakers on a content-neutral basis, both access to space for expressive activity and access to funds with which to support expression within that space must be distributed on a content-neutral basis.

A. *Public Forum Doctrine Governs Resources that Support Speech Within the Campus Forum*

"The object of public forum doctrine," states Robert Post, "is the constitutional clarification and regulation of government authority over particular resources."[67] Space is a resource that, like any other resource student organizations need to engage in speech, can be reduced to financial terms.[68] Simply by maintaining a forum without charging any user fee, the government in effect subsidizes the speech that takes place within that forum.[69] A group that can use university facilities for speech in meetings and presentations to the larger campus community saves the significant cost of renting space.[70] Thus, even where the public forum at issue can easily be conceptualized as a space, what is in fact at issue is the government's ability to make content-based distinctions in subsidizing the use of that space. The creation and maintenance of a public forum can be seen as a subsidy of speech

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67. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1782 (1987).

68. As Elena Kagan points out, "There are many ways for the government to pay for speech, and all content-based underinclusion cases—regardless whether they involve the writing of a check from tax revenues—involve some mechanism by which the government picks up some of the costs of a speaker's expression." Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v. St. Paul, Rust v. Sullivan, *and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 50-51.

69. The argument that public forum doctrine governs public spending for private speech dovetails with Alexander Meiklejohn's conception of the public forum. Meiklejohn commented on

> how inadequate, to the degree of non-existence, are our public provisions for active discussions among the members of our self-governing society. As we try to create and enlarge freedom, such universal discussion is imperative. In every village, in every district of every town or city, there should be established *at public expense* cultural centers inviting all citizens, as they may choose, to meet together for the consideration of public policy.

Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 260 (emphasis added). Meiklejohn's vision of the public forum recognizes that for a public forum to offer a valuable range and quality of speech, the government must act positively to create and support public fora. By inextricably linking funding and speaking, this model obscures the line between passively tolerating free speech in public places and actively encouraging it by creating fora for speech at public expense.

70. A district court noted that the university's refusal in *Widmar* "to '*subsidize*' the religious group by allowing it the free use of facilities granted other student groups" amounted to an infringement on group members' right to associate. Swope v. Lubbers, 560 F. Supp. 1328, 1332-33 (W.D. Mich. 1983) (emphasis added).

that occurs on public property, such as public university campuses, that is traditionally or by designation dedicated to public debate.[71]

Even a paradigmatic public forum case such as *Perry Education Association v. Perry Local Educators' Association*[72] reveals the fallacy of distinguishing between granting an organization access to a spatial forum and subsidizing its speech within that forum. *Perry* is conventionally thought of as a case about access to a spatial forum, school district mailboxes. However, the plaintiffs in *Perry* did not simply want access to the mailboxes as space in which to transmit speech—they wanted to take advantage of the interschool mail delivery system.[73] Access to the public forum of the mail system was desirable because it constituted subsidized transmission of messages to teachers.[74] Comparably, student organizations that seek access to mandatory funds are not barred from speaking within the forum. They have a formal right to use the forum for communication, but, after *Smith*, if the content of their speech is political, their right to use the forum is detached from a valuable subsidy to support use of the forum—a subsidy that other forum-users are granted. Just as use of the mail system in *Perry* could not be separated from subsidized transmission of mail, student organizations' ability to use the campus forum cannot be separated from the ability to apply for funds to support speech within the forum on the same basis as other student organizations do.

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71. David Cole's recent analysis of public subsidies for speech supports the view that the principle of government neutrality governs both access to certain spaces and resources for speech within those spaces. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 709-10 (1992). Professor Cole argues that a "republican" conception of the First Amendment is not content with government noninterference with private speech, but encourages the maintenance of public institutions which encourage "ordinary people" to engage in "ongoing dialogue about public values and norms." *Id.* at 709-10. Maintenance of public fora is a means whereby the government *subsidizes* speech. Professor Cole argues that the reason public forum doctrine forbids all content-based discrimination—and not just the viewpoint-based discrimination that standard subsidy doctrine forbids—is that (1) the public property at issue plays a critical role in public debate, and (2) the public spaces at issue are "dedicated to, or at least consistent with, expression, [so] their functioning will not be hindered by a neutrality mandate." *Id.* at 718. In granting funds for speech within these "institutional spheres of independence and neutrality," *id.* at 681, the government must remain neutral toward the content of applicants' speech. Thus, public forum doctrine is not distinguishable from subsidy doctrine simply because one involves passive tolerance of speech while the other involves active funding of speech.

72. 460 U.S. 37 (1983).

73. *Id.* at 41. As the Court noted, the plaintiffs already had access to several different media with which to communicate to the teachers, ranging from school bulletin boards to the U.S. mail system. *Id.* If the plaintiffs' goal had only been to communicate with teachers, they could have simply used the U.S. mail to send them messages at school.

74. In Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985), the Court stated that in *Perry*, it had "defined the forum as a school's internal mail system and the teachers' mailboxes, notwithstanding that an 'internal mail system' lacks a physical situs." *Id.* at 801. In *Perry*, the Court held that the mailboxes were a nonpublic forum and thus the school district could preserve them for their intended purpose by allowing only the official union to use the mail system. 460 U.S. at 51-53. The Court decided this on the basis of a finding that the mail system had not been made available to the general public in the past, not because the mail system was too dissimilar to traditional spatial property to be considered a forum.

Recognition that use of the campus forum cannot be separated from subsidies which support that use can be seen in *Healy v. James*,[75] a case in which the Supreme Court held that the First Amendment places restrictions on how a public university treats student organizations. The Court held that a public university's failure to recognize a student chapter of Students for a Democratic Society (hereinafter "SDS"), thus limiting its access to university facilities and services,[76] violated students' First Amendment right to associate to further their personal beliefs and participate in the "intellectual give and take of campus debate."[77] The Court discussed the difficulty of distinguishing a forum analysis from a subsidy analysis in the campus setting: Refusal to subsidize a group's speech can seriously hamper the group's ability to participate in the public forum. "We are not free," the Court stated, "to disregard the practical realities"[78] that a denial of university funding would pose for the group. The Court recognized that allowing the group to exist while denying it free use of university facilities for meetings and university media for communication "does not ameliorate significantly the disabilities imposed" by nonrecognition.[79] The First Amendment mandated that SDS' political speech not only be tolerated within a certain public space, but also that its use of that space for expression be supported by the university according to the same guidelines which provided other organizations support for expressive activities.

B. *Public Forum Doctrine as Creating a Baseline Expectation of Funding on a Content-Neutral Basis*

Another way of looking at the relationship between access to public space and funds for speech has to do with speakers' expectation of how they will be treated when using government resources for speech. For instance, Seth Kreimer understands public forum doctrine to be based on a theory that when the government has historically made its property available for private speech, it must continue to do so because citizens have a "baseline" expectation that they will be able to speak freely in that space.[80] In addition, Professor Kreimer sees the "principle of equality of distribution as the baseline from which allocational decisions can be judged"[81] as critical to public forum

75. 408 U.S. 169 (1972).

76. While the administration of Central Connecticut State College did not forbid the group from forming and speaking on campus, denial of official recognition meant that students could not use the student newspaper and campus bulletin boards to advertise the group's meetings and other activities, and that the group could not use campus facilities to hold meetings. *Id.* at 176.

77. *Id.* at 181.

78. *Id.* at 183.

79. *Id.*

80. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1359 (1984).

81. *Id.* at 1365.

cases. A scheme that singles out one class of speakers, denying that class benefits available to others, offends the First Amendment. If the norm is to fund speech, as it is in the context of a public university in which student organizations that comply with content-neutral regulations are generally able to receive funds with which to engage in speech, then refusing to subsidize a subset of student organizations based on the content of their speech violates the public forum doctrine when understood in terms of baseline expectations. Such a denial singles out groups that engage in speech with a particular content and deprives them of an ability to apply for funds which have historically been available to student groups and which are available to all other student organizations on the basis of content-neutral regulations.[82]

C. *Cases Treating Use of Campus Resources as a Public Forum*

These related theories of public forum doctrine—that it governs both access to space and access to funds for speech within that space, and that it governs grants for speech when speakers have a baseline expectation that grants will be distributed on a content-neutral basis—can be seen in cases involving university control over the content of speech in programs for student expression which go beyond tolerance of speech on campus grounds. Courts have recognized that when a public university commits to support a forum for student expression, it may not justify discriminating against speakers within that forum based on the content of their speech by arguing that prior to the university's commitment to fund the forum, the speaker had no constitutional right to have his or her speech subsidized by the state.

Cases involving university-funded school newspapers, for example, rest on this positive conception of public forum doctrine. In *Antonelli v. Hammond*,[83] a university administration required that materials in the student newspaper be approved prior to publication, and refused to release funds necessary for the newspaper to print an article by Eldridge Cleaver. Characterizing the university setting as an open forum where the interchange of ideas should be encouraged, the court held that the university's action violated the First Amendment. The court explained that the "state is not necessarily the unrestrained master of what it creates and fosters."[84] Once a state creates a forum that is generally open for student speech, it may not selectively discriminate against speech on the basis of content or viewpoint.[85] Similarly, in *Trujillo v. Love*,[86] the court

82. Thus Professor Kreimer analyzes *Widmar v. Vincent* as a case in which the university violated the Constitution not because it denied a student organization any constitutional right to the provision of meeting facilities, but because the university's rule "single[d] out for exclusion from otherwise available benefits those who exercise a particular right." *Id.* at 1367.

83. 308 F. Supp. 1329 (D. Mass. 1970).

84. *Id.* at 1337.

85. For example, in Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973), the court held that if a public university establishes a student newspaper, it cannot suppress its publication because college officials

observed that the student newspaper at issue had historically been perceived as a public forum for student speech, and held that when the university suspended a student editor because of the content of articles she wanted to publish, it engaged in unconstitutional content-based censorship.[87]

The facts of *Stanley v. Magrath*,[88] another student newspaper case, in some ways parallel those of *Smith*. In *Stanley*, a public university newspaper had published an issue that many readers found offensive. In response, the regents changed the system for funding the student newspaper from a mandatory student activity fee to a refundable fee. The court held that the new policy was unconstitutional in that it deprived students of funds to print the newspaper because of the content of the message conveyed by the newspaper. The court's holding relied on an understanding of public forum doctrine which extends to the government's positive acts to create what the student body regards as a public forum. Had the *Smith* court used this conception of public forum doctrine in deciding the constitutional challenge to funding political student groups, it would have seen that cutting off mandatory funds solely to groups which engage in "political" speech violates the First Amendment.

D. *Content-Based Subsidies Distort the Forum*

The basis for asserting that public forum doctrine should not recognize a distinction between access to government property for speech and access to funds for speech within that property is not only that access to spatial property is properly understood as a type of subsidy, but also that content-based discrimination in granting subsidies for speech within a public forum harms the forum. This is because funding influences the type of speech that will occur within that forum. As Owen Fiss has noted, "government subsidies are not gifts or bonuses for acts that would have occurred without them. Subsidies . . . have a productive value: they bring into existence . . . [expression] that would not have existed but for the subsidies."[89] Restrictions on the expression of certain viewpoints, whether in the form of withholding subsidies or of banning speech by effectively excising a "particular point of view from public debate . . . . mutilate 'the thinking process of the community' and [are] thus incompatible with the central precepts of the first amendment."[90] Just as banning speech according to its content within a public forum defeats the goal of allowing individuals to speak—and listeners to be exposed to speech—on

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disapprove of its editorials.

86. 322 F. Supp. 1266 (D. Colo. 1971).

87. *Id.* at 1270.

88. 719 F.2d 279 (8th Cir. 1983).

89. Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2096 (1991).

90. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 55 (1987) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 27 (1960)).

representative viewpoints regarding topics of the day, selectively withholding funds from groups based on the viewpoint or content of their speech skews debate within the forum.

Donald Beschle discusses this relationship between selective funding and skewed debate within the public forum by comparing funding of speech within a public forum to the funding of art within a public forum. Beschle asks what the consequence would be if, when the government subsidizes art within a traditional public forum such as a public park, "the government were to fund certain private displays, and withhold funding for others, based upon the viewpoints represented? . . . [T]he effect of the program will be to maximize the exposure of endorsed views and minimize the exposure of alternatives."[91] Selective government funding distorts public debate by magnifying the significance of private individuals' expression which, on the basis of its content, qualifies for government subsidies. This is deceptive because the public assumes that speech or art within a public forum is representative of views held by members of the public as opposed to officially sanctioned views. For instance, those who reasonably assume that the U.C. Berkeley campus is a public forum for student groups may not realize that some groups' speech is subsidized by the University due to its content while others' speech is not, distorting public debate in the way Beschle describes. In order for the government to support a representative, authentic public forum for the dissemination of private views, "the system may not be structured to exclude officially disapproved positions. This should be so whether the resource is a venue or a dollar."[92]

Courts that have used public forum doctrine to decide cases regarding university discretion in funding student organizations have implicitly adopted the view that once the government funds some speech, denial of funds for speech based on its content distorts public debate in a far more invidious way than flat refusals by the government to fund any speech. The preceding cases

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91. Donald L. Beschle, *Conditional Spending and The First Amendment: Maintaining the Commitment to Rational Liberal Dialogue*, 57 MO. L. REV. 1117, 1150 (1992). One commentator suggests that selective, content-based funding may be more effective in skewing debate than content-based criminal prohibitions on speech. Cole, *supra* note 71, at 705. A federal district court recently recognized some of these concerns in deciding a case involving public funding of the arts. In Finley v. National Endowment for the Arts, 795 F. Supp. 1457 (C.D. Cal. 1992), the court rejected the NEA's argument that denial of a grant application to produce performance art was not an injury because it was a mere refusal to subsidize expressive activities rather than a barrier to their exercise. Plaintiffs' allegation that they were denied grants, or penalized, on the basis of the content of past speech, stated a claim that they had suffered an injury under the First Amendment. *Id.* at 1463-64. One argument plaintiffs made was that "public subsidization of art, like public funding of the press and university activities, demands government neutrality." *Id.* at 1472. The court agreed with the plaintiffs, affirming that both academic and artistic expression are "at the core of a democratic society's cultural and political vitality." *Id.* at 1473. The court focused on the concept of academic freedom as a protection of professors' speech, but the analogy can also extend to the campus as a public forum. If "government funding of the arts is subject to the constraints of the First Amendment," *id.* at 1475, such that it does not have free rein to impose content restrictions on grantees, the same should apply for government funding of speech within the campus forum.

92. Beschle, *supra* note 91, at 1149.

regarding funding student newspapers are evidence that courts have recognized this when judging the government's freedom to withdraw funding from speech in programs it has already begun to support. In *Swope v. Lubbers*,[93] a court stated this proposition strongly in holding that the university administration violated students' First Amendment rights by refusing to pay for the rental of X-rated films to show on campus. The court stated that "by the withholding of funds defendants have effectively ensured that a movie of which they disapprove will not be seen .... The label may be 'funding' but the demonstrated effect is censorship."[94] The administration's action violated students' First Amendment rights by discriminating against speech on the basis of its content regardless of the fact that a subsidy was involved. Thus, past courts have recognized that when universities offer funds to support expressive activities on a content-neutral basis, subsequent denials of funding due to the content of expression are indistinguishable from content-based prohibitions of speech.

E. *Subsidy Doctrine and Funding Speech Within a Designated Public Forum*

Notwithstanding the prior discussion, some will argue that funds that a public university grants to student groups should be analyzed separately as public subsidies of speech. Even under pure subsidy doctrine, however, cutting off subsidies from "political" speech is problematic from a First Amendment standpoint. While subsidy doctrine allows the government to incorporate values into publicly supported programs that have a speech element, subsidy cases also recognize that for public fora to be legitimate, should the state use subsidies to finance speech within the public forum, funds must be distributed on a content-neutral basis. Thus, when a subsidy is used to create a public forum, the principles of subsidy doctrine are identical to those of public forum doctrine. Courts have held that while the government may not support one viewpoint over another in distributing funds,[95] the government may define and fund a program on the basis of adopting one value over another. In *Rust v. Sullivan*,[96] the Court held that

> the Government may make a value judgment favoring childbirth over abortion, and implement that judgment by the allocation of public funds. . . . [I]n implementing the statutory prohibition by forbidding counseling, referral, and the provision of information regarding abortion as a method of family planning, the regulations simply

93. 560 F. Supp. 1328 (W.D. Mich. 1983).

94. *Id.* at 1332.

95. Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983) (the government may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas'") (quoting Cammarano v. United States, 385 U.S. 498 (1959)).

96. 111 S. Ct. 1759 (1991).

> ensure that appropriated funds are not used for activities, including speech, that are outside the federal program's scope.[97]

Title X projects were not defined to include abortion counseling, so the government could prohibit such speech. "The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights."[98]

Although *Rust* holds that the government may define and fund a project that incorporates certain values, *Rust* does not preclude an argument that, in some circumstances, the government must distribute funds according to the principles of public forum doctrine. In *Rust*, the Court distinguished situations in which the scope of the program the government funds does not extend to certain topics of speech from cases in which the government creates a public forum.[99] The Court recognized that "the existence of a Government 'subsidy,' in the form of Government-owned property, does not justify the restriction of speech in areas that have 'been traditionally open to the public for expressive activity,' or have been 'expressly dedicated to speech activity.'"[100] If the purpose of a government subsidy is to maintain a space in which the public can be exposed to free speech, then, regardless of speakers' rights to subsidies, grants must be made on a content-neutral basis for the funded space to operate as a legitimate public forum from the audience's perspective.[101] For the audience, the First Amendment danger lies in the "indoctrinating effect of a monopolized marketplace of ideas" masquerading as a public forum.[102] As one commentator points out, the government can distort public debate when its influence on private speech is not obvious:

> As an initial matter, when the government itself speaks in favor of a position, we (the people) know who is talking and can evaluate the speech accordingly. . . . By contrast, when the government finances hitherto private parties to do its speaking, we may have little understanding of the source of the expression. . . . [T]he speakers may have foregone their expression (or even espoused a different view) in the absence of a subsidy. We do not know whether to treat the speakers as independent or as hired guns. . . . When the government speaks through subsidy schemes, it may change and reshape the underlying dialogue.[103]

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97. *Id.* at 1763 (citations omitted).

98. *Id.* at 1775.

99. For a discussion of this distinction, see Cole, *supra* note 71, at 685-94.

100. *Rust*, 111 S. Ct. at 1776 (citations omitted).

101. As Professor Cole points out, when the government funds speech, "first amendment concerns are not limited to potential coercion of the subsidized speaker, but extend also, and perhaps more importantly, to the listener." Cole, *supra* note 71, at 680.

102. *Id.*

103. Kagan, *supra* note 68, at 55; *see* Cole, *supra* note 71, at 675 (arguing that when the government funds speech in certain "spheres of neutrality," including public forums and public universities, it should

Thus, when subsidies can be characterized as public fora, or when subsidies are used in a program that the public understands to support private speech on a content-neutral basis, the standards of public forum doctrine apply.

The U.C. Berkeley campus, like other public university campuses, is a public forum in which all student organizations may speak, but under *Smith*, only nonpolitical organizations qualify to receive funding from mandatory student fees. To the outside observer, it appears that student organizations speak within the campus forum according to how strongly their members feel or how many members they have, but in reality "apolitical" groups will be subsidized while "political" groups will not. The observer will be unaware of the disparity in subsidization between groups and thus will misinterpret the debate within the forum. For the University to create and support a legitimate public forum for student speech, it must be permitted to make content-neutral grants to student organizations that wish to speak within the forum.

Once the university creates and funds a forum for campus speech, it has an obligation not to discriminate against student groups based on the viewpoint or content of their speech. Resources of space as well as money enable student groups to speak on campus through such forms as speaker programs, films, newsletters, leaflets, signs, and advertisements announcing meetings and events. By classifying a group as "political" under the *Smith* plan, one relegates it to seeking voluntary contributions from students each semester. For the campus grounds to function as a true public forum, the relationship between money and speech cannot be ignored while the relationship between space and speech is venerated by the public forum doctrine.

IV. DISCRIMINATION AGAINST POLITICAL AND IDEOLOGICAL SPEECH AS VIEWPOINT-BASED DISCRIMINATION

Even if the public university campus is properly considered a public forum, for the sake of argument it is worth considering a contention that public forum doctrine does not apply to the question of whether the University can deny funding to all "political" and "ideological" student groups.[104] For example, one might believe that the fact that funded speech will take place within a public forum is irrelevant, and the appropriate doctrine for deciding

do so on a content-neutral basis); *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 233-34 (1993) (pointing out that when the government speaks, people will listen with a certain degree of skepticism, while when a private speaker speaks using government funds, people will not know if the person's expression is influenced by the government subsidy program's content-biases); *cf.* Post, *supra* note 67, at 1833-34 (arguing that when the government exercises "managerial" authority, nonpublic forum guidelines should apply, but when the government exercises its "governance" authority over the public realm, traditional public forum guidelines should apply).

104. *See, e.g.*, Elizabeth E. Gordon, Comment, *University Regulation of Student Speech: Considering Content-Based Criteria Under Public Forum and Subsidy Doctrines*, 1991 U. CHI. LEGAL F. 393, 412; *see also* Christina E. Wells, Comment, *Mandatory Student Fees: First Amendment Concerns and University Discretion*, 55 U. CHI. L. REV. 363, 388 (1988).

whether the University may refuse to fund only "political" student groups would be standard subsidy doctrine. The governing subsidy doctrine case on this question is *Regan v. Taxation with Representation*,[105] in which the Court held that Congress would not violate the Constitution if it chose "not to subsidize lobbying as extensively as it chose to subsidize other activities."[106] The government is only required to be neutral as to the viewpoint, or "idea," expressed by the speaker in granting a subsidy.[107] According to several commentators' interpretation of pure subsidy doctrine, "a university decision not to fund any political speech is a decision based upon neutral principles because it does not discriminate among political viewpoints."[108] In order to determine whether or not a subject matter restriction should be analyzed as though it constituted viewpoint-based discrimination, Professor Stone suggests examining the restriction and determining whether in practice it will have a more severe impact on one viewpoint than another.[109] "[N]arrowly defined subject-matter restrictions having a clear viewpoint-differential impact seem to implicate directly both of the concerns underlying the Court's special treatment of content-based restrictions," which are to create a marketplace of ideas and to demonstrate government impartiality.[110]

This Part argues that, in application, a refusal to fund "political" and "ideological" speech is likely to result in harmful viewpoint-based discrimination. If one looks at recent Supreme Court cases dealing with speech, an argument can be made that, at least in certain contexts, the adjective "political" describes a viewpoint rather than subject matter. In addition, if one looks at student speech in practice, one can see that withholding funds from "political" and "ideological" student groups amounts to viewpoint-based discrimination.

A. *Regulation Based on Content, Subject Matter, and Viewpoint*

As an initial matter, it is useful to consider how the Court has defined "viewpoint discrimination." Courts have identified three types of speech regulations as potentially problematic—those that limit speech on the basis of content, subject matter, and viewpoint. Courts have had difficulty, however, in

105. 461 U.S. 540 (1983).

106. *Id.* at 544.

107. *Id.* at 548.

108. Wells, *supra* note 104, at 388. Geoffrey Stone suggests that a ban on "political" speech operates as "subject-matter" discrimination rather than viewpoint-based discrimination. Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 112 (1978). Cass Sunstein points out that in some circumstances, the Supreme Court has permitted a ban on political speech on public property. SUNSTEIN, *supra* note 103, at 172 (referring to Greer v. Spock, 418 U.S. 298 (1974), permitting ban on partisan political speech at army bases, and Lehman v. Shaker Heights, 418 U.S. 298 (1974), permitting ban on political advertisements in buses).

109. Stone, *supra* note 108, at 109-10.

110. *Id.* at 111.

clearly and consistently defining the difference between them. The "content-based" term attempts to distinguish regulations that govern speech according to the message conveyed (content-based) from those which regulate speech without regard to the message conveyed (content-neutral).[111] For example, while a law that restricts noisy speech near a hospital is content-neutral because it limits speech without regard to the message conveyed,[112] a law that restricts speech about labor disputes near a hospital is content-based since it regulates speech according to the message conveyed. Whereas content-neutral laws may limit the time, place, and manner of speech in any forum, all content-based restrictions are forbidden in traditional and designated public fora absent a compelling state interest.[113]

Within the category of "content-based" regulations, courts have distinguished between those that regulate an entire "general subject" and those that regulate according to the viewpoint conveyed. For example, a law prohibiting all picketing near a hospital except that involving labor disputes would be a subject matter restriction,[114] whereas a law allowing picketing in favor of a strike but prohibiting picketing against a strike would be viewpoint-based.[115] As noted above, the government may discriminate on the basis of subject matter, but not viewpoint, in distributing subsidies for speech.[116]

B. *"Political" and "Ideological" as Viewpoints*

The Court seems to have already recognized that regulations that discriminate against certain controversial subjects are in fact viewpoint-based. In *Lamb's Chapel v. Center Moriches Union Free School District*,[117] the Court held that in granting use of its facilities, a school district violated the Free Speech Clause of the First Amendment when it discriminated against organizations that wished to use the facilities for religious purposes.[118] The Court held that even if the school facilities were a nonpublic forum,[119] discriminating against religious groups is viewpoint-based because it allows

111. Stone, *supra* note 90, at 47-50.

112. *Id.* at 48.

113. *See supra* note 65.

114. Such a law would restrict expressive conduct according to a "classification[] formulated in terms of the subject" of expression. Police Dep't v. Moseley, 408 U.S. 92, 95 (1972); *see also* Stone, *supra* note 90, at 86.

115. This sort of law would be viewpoint based since it regulates speech according to whether one supports or opposes a certain action. See also Justice Brennan's distinction between regulations pertaining to the subject of discussion and those pertaining to views on that subject. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 59, 61 (1983) (Brennan, J., dissenting) (citing Stone, *supra* note 90).

116. *See supra* note 107 and accompanying text.

117. 113 S. Ct. 2141 (1993).

118. *Id.* at 2147.

119. Recall that in nonpublic forums, content-based discrimination is allowed but viewpoint-based discrimination is prohibited. *See Perry*, 460 U.S. at 46.

use of school property for presentation of all views about certain subjects "except those dealing with the subject matter from a religious standpoint."[120]

The court's treatment of "religious" as a point of view suggests that categories of speech that might have once been considered subject matter- or content-based may now be considered viewpoint-based. If speech that deals with families from a religious perspective can be characterized as speech on the *subject* of families from a religious *point of view*, it is difficult to see why speech on, for instance, the *subject* of the environment from a political *perspective* is not speech on an apolitical subject from a political *point of view*. When a certain viewpoint is so closely tied to a particular subject that to prohibit discussion of the subject silences speakers with that point of view (as a ban on speech about religion would do for speakers with a religious point of view), the Court has indicated that it is appropriate to recognize that what appears to be subject matter discrimination functions as viewpoint discrimination. Just as the Court regarded speech that incorporates a religious view of the world as speech of a particular viewpoint, speech that is informed by a political view of the world should be categorized as viewpoint-based, following the reasoning of *Lamb's Chapel*.

C. *Discrimination Against "Political" and "Ideological" Speech as Viewpoint-Based in Practice*

In practice, a refusal to allow "political" and "ideological" student groups to apply for mandatory funds amounts to viewpoint discrimination. Consider, for example, *Gay & Lesbian Students Ass'n v. Gohn*, a case challenging a rule prohibiting the funding of any student group "organized around sexual preference."[121] It is easy to see how such a subject matter restriction can fit into a campaign to silence gay and lesbian student groups on the basis of their "view" about homosexuality.[122] In response to a refusal to fund a student organization in the context of such a campaign, the Eighth Circuit held that discrimination in funding on the basis of distaste for a group's ideas violates the Constitution because

> a public body that chooses to fund speech or expression must do so even-handedly, without discriminating among recipients on the basis

120. *Lamb's Chapel*, 113 S. Ct. at 2147.

121. Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 364 (8th Cir. 1988). The Student Senate at the University of Arkansas, Fayetteville, passed this regulation, but because the rule was vetoed by the student association president before it could take effect, the court did not rule on its constitutionality. The court's holding pertains to the university's refusal to fund the Gay & Lesbian Student Association in light of a history of attempts to deny support to the group because of the content of its speech.

122. The plaintiffs' attorney in *Smith* claimed that a ban on funding "political" speech with mandatory activity fees will prohibit funding the Gay and Lesbian Student Union at Berkeley, illustrating how the facially neutral ban on "political" speech may behave in a similarly viewpoint-biased way. Hager, *supra* note 12, at A3.

> of their ideology. The University need not supply funds to student organizations; but once having decided to do so, it is bound by the First Amendment to act without regard to the content of the ideas being expressed.[123]

When the subject matter of which a group speaks is inherently controversial, it is difficult to categorize the discrimination against it as either content-based or viewpoint-based. While "sexual preference" is a subject, the restriction will disparately impact students who hold the more controversial view on the subject. Students who practice or believe in heterosexuality do not have the same need to organize for support and education as students who practice or believe in homosexuality; mainstream culture is geared towards heterosexuality, obviating the need for a person who supports heterosexuality to take a political stand on the issue. Notwithstanding claims by the student association that they refused to fund the group for viewpoint-neutral reasons, the Eighth Circuit had no difficulty characterizing the entire campaign of which the proposed ban was a part as impermissible discrimination on the basis of ideology.[124]

Without explicitly acknowledging it, the Supreme Court seemed to adopt this approach to determining whether a regulation is viewpoint-based or subject matter-based in *R.A.V. v. City of St. Paul*.[125] In Justice Scalia's majority opinion, the Court held that a city ordinance criminalizing symbolic speech that "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender"[126] is unconstitutional because it "prohibits otherwise permitted speech solely on the basis of the *subjects* the speech addresses."[127] One could argue, as Justice Stevens did in his concurrence, that the ordinance was viewpoint-neutral, or only discriminated on the basis of subject matter, because it concerned *all* "fighting words" based on a person's race, color, creed, religion, or gender.[128] However, in delivering the majority opinion, Justice Scalia did not distinguish subject matter- and viewpoint-based discrimination. He argued that the ordinance was unconstitutional because in operation it would discriminate on the basis of viewpoint—it would leave unregulated nonracist fighting words uttered by opponents of racism, but prohibit racist statements by proponents of racism.

An analogy to *R.A.V.* can be made when analyzing discrimination against political speech. As Justice Stevens pointed out in his concurrence, a ban on hurtful racist speech is in one sense viewpoint-neutral—it protects members of

123. *Gohn*, 850 F.2d at 362.
124. *Id.* at 366-68.
125. 112 S. Ct. 2538 (1992).
126. St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minneapolis Legis. Code § 292.02 (1990).
127. *R.A.V.*, 112 S. Ct. at 2542 (emphasis added).
128. *Id.* at 2570-71 (Stevens, J., concurring).

all races who are insulted on the basis of their race.[129] Similarly, some might argue, a rule that no "political" student groups may apply for funds generated by mandatory student fees could be characterized as viewpoint-neutral because it applies to all "political" groups regardless of the particular viewpoint that they espouse. However, in *R.A.V.* the majority characterized the ban as viewpoint-based, because the ordinance criminalized the speech of those who want to use fighting words to express a view of the world informed by racism—or racist fighting words—while it did not restrict the speech of people who want to use fighting words to express a view of the world informed by some other system of ordering reality. Could not the same be said for discriminating against student groups that want to speak about the world in terms of politics instead of, for instance, athletic rivalries?[130]

For instance, one group *Smith* identifies as "political" is the U.C. Berkeley Feminist Alliance and Women Organized Against Sexual Harassment (FAWOASH). FAWOASH might not limit its political opponents to anti-feminist "political" groups. FAWOASH might also oppose aspects of campus culture, such as the football team, which, while not "political" in a narrow sense of the term, have been linked to campus sexual harassment and rape of women.[131] The impact of the *Smith* order on FAWOASH would be viewpoint-neutral in a narrow sense—just as FAWOASH's speech would decrease under the activity fee system ordered by *Smith*, so would the speech of its opponents, a hypothetical group which takes an anti-feminist position on political issues.[132] The claim that the *Smith* order is therefore viewpoint-neutral parallels Justice Stevens' claim that the ordinance in *R.A.V.* was viewpoint-neutral: both the speech of those who wish to offend people on the basis of being black and those who wish to offend people on the basis of being white or any other race are banned, so the ordinance is neutral.

Justice Scalia, however, was concerned with a different type of opponent in the debate. This opponent does not wish to use speech to express an opposing view within racist discourse, but instead wants to argue that people

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129. *Id.* at 2571.

130. If *R.A.V.* only applies to laws that discriminate against speech within the realm of fighting words, the analogy does not work. To the majority, however, the crucial point was that the speech was used in debate by speakers who held a certain viewpoint, not that the words were fighting words. In the majority opinion, Justice Scalia stated that "[a]ssuming, *arguendo*, that all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." *Id.* at 2542.

131. According to Bernice Sandler, director of the Project on the Status of Women for the Association of American Colleges, 80-90% of men involved in college gang rapes are members of fraternities or student athletic groups, usually football or basketball teams. William Douglas, *Disturbing Pattern Seen in Gang Rapes; Many Linked to Male Rites of 'Bonding'*, NEWSDAY, May 13, 1990, at 2. Indeed, a charge of gang rape made against four football players in 1986 precipitated the formation of a campus anti-rape coalition at U.C. Berkeley, a group which can be compared to FAWOASH. *Coeds Stage Anti-Rape Rally on Berkeley Campus*, UPI, Dec. 6, 1986, *available in* LEXIS, Nexis Library, UPI File.

132. Comparably, under the *Smith* system, pro-choice and anti-choice student organizations would be hurt to the same degree.

should not be valued on the basis of their race. In other words, Justice Scalia was not concerned with debate between white supremacists and black supremacists, but with argument between racists and groups who do not think the world should be ordered in terms of race. Justice Scalia's concern was that opponents of racism would be free to use the fighting words of *their* choice—non-racist fighting words—to offend racists, while the racists could not use the fighting words of *their* choice—racist fighting words—to fight back.[133]

The analogue to the nonracist group in the FAWOASH example would be a group of students who do not believe that institutions such as the school football team are "political." Like the *Smith* court, these students are likely to conclude quickly that a group such as FAWOASH, which concerns itself with rape and sexual harassment, is clearly "political," whereas the school football team has nothing to do with rape and sexual harassment, and is therefore apolitical. However, it is not irrational to believe that such institutions as the school football team are intimately connected with campus rape and sexual harassment.[134] Rather than acknowledging that, from some students' perspective, support for the football team is in direct opposition with a movement to eliminate rape on campus, the *Smith* opinion incorporates the worldview of students who do not think that campus institutions conventionally characterized as apolitical should be analyzed as political. Under *Smith*, students could form an organization such as a Yell Leaders Club, which uses speech to support the football team. This group may not engage in obviously political anti-feminist speech, but its unreflecting support of the football team implicitly rejects the idea that the political issues of rape and sexual harassment are linked to such programs. Because support of the football team is not generally (or in *Smith*) considered political or ideological, these students will be able to use mandatory activity fee funds to communicate, while FAWOASH, a "political" group, will not. This differential treatment amounts to the type of viewpoint-discrimination that led the *R.A.V.* majority to hold that a ban on hurtful "racist" fighting words was inherently viewpoint-based.

In the college campus context, groups that believe that campus life is political frequently come into conflict with campus groups that believe that the commonplaces of college life are apolitical. Campus debate often takes the form of opposition between groups that oppose the status quo and are therefore "political," and those that support the status quo and thus do not encourage students to think about politics at all. To return to the example of the Gay and Lesbian Student Union, plaintiffs have suggested that this group will be viewed as "ideological," but neither side has suggested that student groups concerned

133. Justice Scalia argued that the ordinance would "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." *R.A.V.*, 112 S. Ct. at 2548.

134. *See supra* note 131.

with heterosexuality will also be considered "ideological." Moreover, even if the University determined that a group concerned with homosexuality is no more ideological than a group concerned with heterosexuality, the group concerned with homosexuality will have far more reason to discuss politics than will the heterosexual group. The group concerned with homosexuality opposes the status quo, and part of such a stance means opposing legislation specifically addressed at homosexual men and women.[135] The heterosexual group does not face analogous political opposition, and thus has no corresponding need to become politicized.

Professor Fiss urges looking at the impact of seemingly neutral criteria used in making allocation decisions; the "ideal of neutrality in the speech context not only requires that the state refrain from choosing among viewpoints, but also that it not structure public discourse in such a way as to favor one viewpoint over another. The state must act as a high-minded parliamentarian, making certain that all viewpoints are fully and fairly heard."[136] While the funding system ordered in *Smith* is neutral as between progressive and conservative "political" student groups, it does discriminate between groups that support and groups that oppose the status quo. Under *Smith*, the speech of complacent mainstream groups will be subsidized, but not that of their politicized opponents. This discrimination is viewpoint-based because the government will support the speech of those with a mainstream view of public issues while withholding support from those who challenge that view. This dynamic returns us to the original argument that the *Smith* court should have given more weight to the fact that the University was attempting to support a diverse range of student speech when it decided whether funding political student organizations was germane to the University's purpose: Funding political groups was germane to the program's purpose—to support a diversity of student speech—because a funding program which does not ban applications from political student organizations is far more valuable to the university in carrying out its mission to educate by supporting a campus forum for debate.

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135. *See, e.g.*, Steven A. Holmes, *Gay Rights Advocates Brace for Ballot Fights*, N.Y. TIMES, Jan. 12, 1994, at A17 (eight states may have ballot initiatives this year seeking to restrict rights of homosexual men and women).

136. Fiss, *supra* note 89, at 2100. Cass Sunstein also notes that

> the First Amendment has the structural goal of promoting a certain kind of deliberative process. . . . if the government is permitted to obtain a number of enforceable waivers of the free speech right [for example, waiver of the right to speak about political issues in exchange for the benefit of a subsidy for speech], the aggregate effect may be substantial, and the deliberative processes of the public will be skewed.

SUNSTEIN, *supra* note 103, at 115.

VI. CONCLUSION

Because the *Smith* court failed to perceive the fee system as a means of funding a public forum for student speech, a factor critical to the constitutionality of the system, public forum doctrine had no bearing on the decision. If one analyzes subsidized speech on university campus grounds in light of the fact that the university is a public forum with respect to its students, however, one can see that under the forced association doctrine, content-neutral funding is not only permitted but required.

Prior to *Smith*, the mandatory fee system at U.C. Berkeley strove to allow students' interests and convictions to guide what speech would be funded within the forum. Students were free to form organizations and request funds under content-neutral guidelines. Organizations could then use the funds to advocate positions within the forum on behalf of their organization, not the entire student body. This system not only avoided the constitutional evil of compelling students to identify themselves personally with particular viewpoints taken by various student organizations, but it also contributed to the educational experience Berkeley sought to offer its students.[137] Undoubtedly many public university students will view the *Smith* opinion as an invitation to challenge mandatory fee systems within their own universities.[138] This Note has argued that courts faced with these challenges in the future should incorporate a deeper appreciation than did the *Smith* court for the doctrine and policy goals relating to support for speech within public fora, as well as the tradition within higher education of actively encouraging free debate on controversial public matters.

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137. Recently, the importance of university *provision for*, not merely tolerance of, student involvement in public life has been emphasized by a national group studying what purposes higher education in the United States should serve. For example, the group reported that it wanted "to stress that society's needs will be well served if colleges and universities wholeheartedly commit themselves to providing students with opportunities . . . [for] first-hand experience, such as contributing to the well-being of others, [and] participating in political campaigns." WINGSPREAD GROUP ON HIGHER EDUCATION, AN AMERICAN IMPERATIVE: HIGHER EXPECTATIONS FOR HIGHER EDUCATION 10 (1993); *see also id.* at 66, 123.

138. The reasoning of *Smith* could be extended to use of student fees for any controversial expression regarding public matters. One commentator argues that just as college students' associational interests are infringed upon when a portion of their fees is used to fund political speech with which they disagree, law school students' associational interests are infringed upon when their tuition or fees partially go toward subsidizing loan forgiveness for students working at organizations that take political positions with which some of the students disagree. Luize E. Zubrow, *Is Loan Forgiveness Divine? Another View*, 59 GEO. WASH. L. REV. 451, 527-30 (1991).